Supreme Court, U.S.
FILED
JUN 28 2005
OFFICE OF THE CLERK

No. 05-14

IN THE

Supreme Court of the United States

MARY CHRISTENSON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Defendant.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

BRUCE A. ZIMET *
One Financial Plaza
Suite 2612
Fort Lauderdale, FL 33394
(954) 764-7081

* Counsel of Record

Counsel for Petitioner

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTIONS PRESENTED FOR REVIEW

I. Whether a trial judge must investigate whether intra-juror violence during deliberations has prejudiced a jury and whether that prejudice can be cleansed.

II. Whether an *Allen* charge is unduly coercive when given shortly after the failed polling of a jury's guilty verdict as well as the jury's subsequent notice of a "hostile situation" in the jury room involving juror fear and threats of physical violence between jurors necessitating the posting of Marshals outside doors to the jury room.

PARTIES

1. Mary Christenson, Petitioner
2. Eric Johnson, Co-defendant
3. United States of America, Respondent

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES	ii
TABLE OF AUTHORITIES	v
OPINION BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
REASON FOR GRANTING WRIT	5
I. A TRIAL JUDGE MUST INVESTIGATE WHETHER INTRA-JUROR VIOLENCE DURING DELIBERATIONS HAS PREJUDICED A JURY AND WHETHER THAT PREJUDICE CAN BE CLEANSED.	5
II. AN *ALLEN* CHARGE IS UNDULY COERCIVE WHEN GIVEN SHORTLY AFTER THE FAILED POLLING OF A JURY'S GUILTY VERDICT AS WELL AS THE JURY'S SUBSEQUENT NOTICE OF A "HOSTILE SITUATION" IN THE JURY ROOM INVOLVING JUROR FEAR AND THREATS OF PHYSICAL VIOLENCE BETWEEN JURORS NECESSITATING THE POSTING OF MARSHALS OUTSIDE DOORS TO THE JURY ROOM	11
CONCLUSION	13

TABLE OF CONTENTS—Continued

APPENDICES Page

APPENDIX A. Court Of Appeals Order Denying Petition For Rehearing, April 5, 2005 ..... 1a

APPENDIX B. Court Of Appeals Opinion, February 8, 2005 ..... 3a

APPENDIX C. Order Of The District Court, December 30, 2002 ..... 20a

APPENDIX D. Judgment 26a

TABLE OF AUTHORITIES

CASES — Page

Allen v. United States, 164 U.S. 192 (1896) ..... *passim*
Dyer v. Calderon, 151 F.3d 970 (9th Cir. 1998) ... 5
Oswald v. Bertrand, 374 F.3d 475 (7th Cir. 2004) 7
Smith v. Phillips, 455 U.S. 209, 102 S.Ct. 940, 71 L.Ed. 2d 78 (1982) 9
Tanner v. United States, 483 U.S. 107, 107 S.Ct. 2739, 97 L.Ed.2d 90 (1987) 7, 10
United States v. Anello, 765 F.2d 253 (1st Cir. 1985) 6
United States v. Angulo, 4 F.3d 843 (9th Cir. 1993) 7, 9
United States v. Boylan, 898 F.2d 230 (1st Cir. 1990) 6
United States v. Bradshaw, 281 F.3d 278 (1st Cir. 2002) 6
United States v. Chigbo, 38 F.3d 543 (11th Cir. 1994) 11
United States v. Copeland, 51 F.3d 611 (6th Cir. 1995) 7
United States v. Cox, 324 F.3d 77 (2nd Cir. 2003) 6
United States v. Dickerson, 248 F.3d 1036 (11th Cir. 2001) 11
United States v. Dominguez, 226 F.3d 1235 (11th Cir. 2000) 5
United States v. Gabay, 923 F.2d 1536 (11th Cir. 1991) 11
United States v. Harris, 908 F.2d 728 (11th Cir. 1990) 6
United States v. Hunnewell, 891 F.2d 955 (1st Cir. 1989) 6

TABLE OF AUTHORITIES—Continued

	Page
United States v. McVeigh, 153 F.3d 1166 (10th Cir. 1998)	6
United States v. Polar, 369 F.3d 1248 (11th Cir. 2004)	11
United States v. Prosperi, 201 F.3d 1355 (11th Cir. 2000)	6
United States v. Rey, 811 F.2d 1453 (11th Cir. 1987)	11
United States v. Spitz, 696 72d 916 (11th Circuit 1983)	12
United States v. Trujillo, 146 F.3d 838 (11th Cir. 1998)	11
United States v. Watchmaker, 761 F.2d 1459 (11th Cir. 1985)	8
United States v. Yoakam, 168 F.R.D. 41 (D. Kan. 1996)	7
CONSTITUTION	
Amendment VI	*passim*
STATUTES	
28 U.S.C. §1254(1)	1
RULES	
Rule 606(b), Fed.R.Evid.	*passim*
Rule 23(b), Fed.R.Cr.P.	2, 10

IN THE

Supreme Court of the United States

No. ___

MARY CHRISTENSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Defendant.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

PETITION FOR WRIT OF CERTIORARI

OPINION

Petitioner's conviction and sentence was affirmed by the Eleventh Circuit Court of Appeals in an unpublished opinion under the following caption, *United States v. Christenson et. al.*, No. 03-11387 (11th Cir. 2005).

JURISDICTION

This Petition for Writ of Certiorari follows a judgment of the Eleventh Circuit Court of Appeals affirming Petitioner's conviction and sentence. This Court has jurisdiction to consider this Petition for Writ of Certiorari pursuant to 28 U.S.C. § 1254(l).

The Eleventh Circuit Court of Appeals judgment was entered on February 8, 2005. Petitioner's application for rehearing was denied on April 5, 2005.

CONSTITUTION PROVISIONS AND STATUTES INVOLVED

The Petition for Writ of Certiorari relates to the following Constitutional provisions and statutes:

United States Constitution, Amendment, VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in favor, and to have the Assistance of Counsel for his defense.

Federal Rule of Evidence 606 (b)

Inquire into validity of verdict or indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

Federal Rule of Criminal Procedure-Rule 23(b)

Jury of Less Than Twelve. Juries shall be of 12 but at any time before verdict the parties may stipulate in writing with the approval of the court that the jury shall consist of any number less than 12 or that a valid verdict may be returned by

a jury of less than 12 should the court find it necessary to excuse one or more jurors for any just cause after trial commences. Even absent such stipulation, if the court finds it necessary to excuse a juror for just cause after the jury has retired to consider its verdict, in the discretion of the court a valid verdict may be returned by the remaining 11 jurors.

STATEMENT OF CASE

Petitioner is currently serving a thirty-three month sentence following her conviction for conspiracy, false statement and mail fraud related offenses in the United States District Court for the Southern District of Florida. This Petition concerns the Eleventh Circuit Court of Appeals' affirmation of the district court's rulings involving the unique and bizarre jury deliberations which resulted in Christenson's conviction.

The initial appearance of a problem surfaced during the polling of the jury which had returned guilty verdicts as to both Christenson and co-defendant Johnson. The first six jurors affirmed that the guilty verdicts were in fact their verdicts. Juror number seven, however, appeared in obvious distress when questioned by the Court. During a colloquy with the Court, highlighted by juror number seven's crying and hesitation to answer the Court's questions, the juror ultimately asked the Court "can we talk first" before responding to the Court's verdict questions.

Pursuant to the juror's response, the Court sent the jury back to continue deliberations. The jury then informed the Court that they had not reached a unanimous verdict and asked the Court to recess for the evening. The Court accommodated the request.

The Court later stated that it had viewed the aborted guilty verdict as little more that an interruption before an ultimate guilty verdict.

> . . . I mean, it was pretty clear that this jury was going to come back guilty, . . . you know it was obvious when we

> got the message that they had reached a decision that it was going to be—to me it was clear it was going to be a guilty verdict. . . .

The next morning the first jury bombshell was received in the form of a note from the jury foreperson requesting a "one-on-one" meeting with the [Court] "because the jury room has become a **hostile situation**, and I, as jury foreman, need some direction." (Emphasis added.)

Defense counsel asked the district court to seek the jurors' description of the "hostile situation" before acting on the information in the note. Accordingly, with defendants' consent, the district court asked the jury to define the term "hostile situation" as presented in the jury's note to the district court.

The jury foreperson's response provided the second jury bombshell.

> Dear Judge: Hostile situation:
>
> 1. One jury member making threats upon another.
> 2. Myself having to step between 2 jury members to obtain order in the jury room.
> 3. One jury member feels scared.

The note concluded that "however we do feel we now have the situation under control."

The Defendants immediately requested a mistrial. The district court, which had earlier revealed that his "impression from my courtroom deputy that that's the concern, **that they have a concern for their safety**" (Emphasis added), responded:

> THE COURT: Get me some case law on it. I don't know of any case law on it. *I think it's a situation where jurors get heated and tempers flare and things happen.*

> They say they have got it under control. I am going *to ask the Marshal Service to have a court security officer at each door so that if there is a knock on the door, that there is someone at each door.*
>
> And the motion for a mistrial is denied.

(Emphasis added.)

The jury immediately informed the Court that "the jury, still do not have a unanimous decision and we are certain we, the jury, will not reach a unanimous decision."

The Government, which previously had unsuccessfully requested an *Allen* instruction at the time of the "hostile situation" jury communication as a means "maybe to calm things down", prevailed upon the district court to give the *Allen* charge over the defendants' objections. Guilty verdicts as to all twenty counts as to each defendant resulted quickly thereafter.

REASON FOR GRANTING THE WRIT

I. WHETHER A TRIAL JUDGE MUST INVESTIGATE WHETHER INTRA-JUROR VIOLENCE DURING DELIBERATIONS HAS PREJUDICED A JURY AND WHETHER THAT PREJUDICE CAN BE CLEANSED.

The Sixth Amendment guarantees a defendant the right to an impartial jury trial. Factual questions concerning a defendant's guilt or innocence may only be determined by an impartial jury of a defendant's peers. *See e.g. United States v. Dominguez*, 226 F.3d 1235, 1243 (11th Cir. 2000); *Dyer v. Calderon*, 151 F.3d 970, 973 (9th Cir. 1998). Jury impartiality mandates the absence of coercion, fear of violence or physical threats during the course of jury deliberations. Once a jury has been contaminated by such juror misconduct a verdict from that jury should not be sustained unless the trial court has insured that the misconduct has terminated and all